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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MONICA CHRISTIE KENNEDY,

Defendant and Appellant.

A134303

(Solano County
Super. Ct. No. FCR281958)

Monica Christie Kennedy appeals from her felony conviction for possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and finding of a prior felony conviction (Pen. Code, § 667.5, subd. (b)). Defendant's appointed counsel on appeal raises no issues and asks this court to conduct an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Defendant was notified of her right to file a supplemental brief, but has not done so. Our review has uncovered no appealable issues requiring further briefing.

BACKGROUND

The information charged defendant with one count of unlawful possession of a controlled substance, methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The charge included an allegation of a prior conviction for possession for sale of methamphetamine (Health & Saf. Code, § 11378) resulting in a sentence enhancement (Pen. Code, § 667.5, subd. (b)).

The court granted defense motions to bifurcate trial on the prison prior and to exclude any mention of the defendant's parole status at the time of her arrest. Over

defense objection, the court granted the People's motion to admit evidence of the defendant's prior conviction to show defendant had the requisite knowledge of the nature and presence of the substance found on her. The court agreed to take judicial notice that defendant was previously convicted of possession of methamphetamine in Solano County, but that there would be no reference to the prior possession for sale. (Health & Saf. Code, § 11378).

At trial, the jury heard testimony from three prosecution witnesses: Officers Aaron Love and Carly Broaddus of the Vacaville Police Department, and Criminalist Nathaniel Overlid of the Solano County District Attorney Bureau of Forensic Services.

Love testified that on December 30, 2010, at 2:45 a.m., he stopped a vehicle turning onto Alamo Lane from Alamo Drive in Vacaville. There were two individuals in the car, the driver and a passenger Love identified as defendant. Love requested assistance at the location and Broaddus responded to assist a search.

Broaddus testified that she asked defendant if she had anything illegal on her, to which defendant answered "no." Defendant consented to a search of her person which produced a small piece of plastic bag, tied off at one end, hidden in defendant's bra. Broaddus opened the bag and saw a white crystalline substance which she believed, based on her training and experience, was methamphetamine. Love testified that he also believed the substance to be methamphetamine, performed a presumptive test that was positive for methamphetamine, and weighed the item at 0.56 grams. Love placed the item in a narcotics envelope and placed it in evidence upon returning to the station. Overlid testified that at the lab he performed two screening tests on the substance that were presumptively positive for methamphetamine, and an instrument test that identified the substance as methamphetamine. Overlid testified that the drugs were in a usable quantity, and that the item weighed 0.34 grams.

Following testimony, the court took judicial notice of defendant's prior conviction for possession of methamphetamine. During jury instructions, the court instructed the jury, in accordance with its pretrial motion ruling, that any evidence the jury heard concerning defendant's prior conviction for possession of methamphetamine could only

be used for the limited purpose of determining whether or not defendant knew the nature and presence of the substance in question, and not to show defendant had a bad character or is disposed to commit crime. Following deliberation, the jury found defendant guilty on the sole count of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). After the second phase of the bifurcated trial, the jury returned a true finding that defendant had been convicted of a previous felony, and had been convicted of a new felony offense within five years.

On December 12, 2011, the court suspended the imposition of judgment and sentence, placed defendant on three years formal probation, and imposed several terms and conditions. The court ordered defendant to serve 60 days in county jail, with one day of actual custody credit, and an additional 40 days credit upon successful completion of the Sarah Home for Women program in which defendant was already enrolled. Defendant was ordered to pay a \$200 restitution fund fine, a \$200 stayed probation revocation fee, a \$40 court security fee, a \$30 criminal conviction fee, a \$50 drug lab fee, and a drug program fee of \$150. Defendant was required to submit to warrantless search and seizure at any time by any peace or probation officer, to register as a drug offender pursuant to Health and Safety Code section 11590, and seek and maintain full time gainful employment and/or vocational or educational training, or both.

Defendant filed a timely notice of appeal on January 11, 2012. Defendant appeals from both the jury trial from October 25, 2011 to October 26, 2011 and from the judgment and sentence on December 12, 2011.

DISCUSSION

This court has made an independent review of the entire record and has found no arguable issues.

During trial, the court denied a contested motion to exclude defendant's prior conviction as evidence in the present case. Evidence Code section 1101, subdivision (b) provides that evidence a person committed prior crimes can be admitted to prove some other relevant fact, such as knowledge, other than his or her disposition to commit such an act on this occasion. Admission of evidence of previous convictions is left to the

sound discretion of the trial judge to weigh the probative value against its prejudicial effect. (*People v. Matson* (1974) 13 Cal.3d 35, 40.) If the defendant does not stipulate to, or state they will not raise, an issue during trial, then the prosecution must put on evidence to prove every element of the crime. (*People v. Johnson* (1981) 123 Cal.App.3d 106, 113.) The admission of a prior crime by the court is only overturned in the case the court abused its discretion. (*People v. Sully* (1991) 53 Cal.3d 1195, 1226.)

Here, defendant did not stipulate to knowledge that the substance in her bra was methamphetamine. Therefore, the People had the burden to prove defendant's knowledge beyond a reasonable doubt. As required by Evidence Code section 352, the court weighed the probative value of admitting the evidence against its prejudicial effect, and found the probative value of the prior conviction was substantial and outweighed any prejudicial effect. The only other pieces of evidence available to the People to show knowledge were the intimate location of the item hidden in defendant's bra, and defendant's lack of reaction when Broaddus discovered the suspected methamphetamine. Any inference drawn from that evidence alone would have been circumstantial.

Additionally, the court made an effort to limit the prejudicial effect of the evidence by taking judicial notice of a prior conviction for possession of methamphetamine and not for sale, by admonishing the jury that they were to use the evidence of the prior conviction only for the purpose of whether or not the defendant had the requisite knowledge, and by giving a limited purpose jury instruction. The actions of the court were proper and do not constitute abuse of discretion.

We also reviewed to determine whether the judgment and sentence imposed by the trial court was beyond that court's discretion. Possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) carries a sentence of no more than one year imprisonment in a county jail pursuant to Penal Code section 1170, subdivision (h). Additionally, when a defendant does not remain free from a felony conviction for a period of five years from the previous conviction, a one-year sentence enhancement is appropriate for each previous felony (Pen. Code, § 667.5, subd. (b)).

Defendant was sentenced to serve 60 days in a county jail with 40 days credit if she completes the Sarah Home for Women program in which she was previously enrolled. This is within the maximum sentence of two years the court could have imposed. There is no evidence that the court acted outside the statutory limit or abused its discretion in sentencing defendant.

DISPOSITION

Our independent review of the record reveals no arguable issues that require future briefing. The judgment is affirmed.

Lambden, J.

We concur:

Kline, P.J.

Haerle, J.